No. 2440

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDWIN RICHARDS,
Plaintiff in Error,

vs.

AMERICAN BANK OF ALASKA
(a corporation),
Defendant in Error.

PETITION OF DEFENDANT IN ERROR FOR A REHEARING.

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Of Counsel.

Filed this.....day of August, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The defendant in error respectfully asks the Court to grant a *rehearing* of this cause upon the grounds hereinafter stated (all *italics* throughout this petition are *ours*).

THE MOTION TO DISMISS WRIT OF ERROR.

The motion to dismiss the writ of error should have been granted, because this case is *within* the

two reasons within which the opinion states the case must be to justify granting such a dismissal; and the case was *not* taken out of either of these reasons nor was the failure to obtain a severance below obviated by the appearance of Williams in *this* Court filed by the plaintiff in error when the case was heard upon the calendar of this Court in March, 1916.

I.

The Court *denied* our *motion to dismiss* the writ of error upon the authority of the *two* reasons given by the Supreme Court in *Masterson v. Herndon,* 10 Wall. 416, where Justice Miller, after stating that the Court did not attach importance to the *technical mode* of proceeding called summons and severance, said:

> "We should have held this appeal good *if it had appeared* in any way by the record that Maverick *had been notified* in writing *to appear, and* that he *failed* to appear, *or, if appearing,* had *refused* to join",

and Your Honors quote Justice Miller:

> "that without summons and severance the appeal *must* be dismissed" and state "the *reason* therefor to be, that *with* such summons and severance the Court below would be enabled *to execute* its decree as far as it could be executed *on the party who refused to join* in the appeal, and that party would be estopped from bringing *another* appeal for the same matter",

again quoting Justice Miller, that

> "The latter point is one to which this Court has always attached such importance,"

and Your Honors say:

> "*In the present case both grounds* for dismissal have been *obviated by the appearance* which Williams, the co-defendant with the plaintiff in error in the Court below, has *filed in this* Court."

There is absolutely nothing in the record and absolutely no showing that any notice was ever given or attempt at severance was ever made in the *Court below,* and *that* is the Court to which Justice Miller referred.

It undoubtedly escaped Your Honors' notice, that in *this* case, the judgment was entered April 20, 1914 (Tr. 20), and Richards obtained the *order* allowing the writ of error on April 21, 1914 (Tr. 289-290), the *writ* of error was issued May 2, 1914 (Tr. 292-293), and yet this *appearance* of Williams was *not filed* in this Court until the *hearing* on the calendar in March, 1916, nearly *two* years *after* the judgment was entered and writ of error issued, and this appearance was *never* filed in the Court below; and it was *not* even *signed* by Williams until June 9, 1915 (reply brief plaintiff in error, p. 21); not even then *filed in this* Court until March, 1916, nearly a year after it was signed by Williams.

The judgment below could not therefore be executed, and until his year to do so expired, Wil-

liams had the absolute right to sue out a writ of error.

Your Honors state that *one* of the reasons for requiring a joint defendant to join in the writ of error or be severed and shut out by notice to him to join, is, so that the Court and the prevailing party below *may execute* the judgment against the party *not* appealing; and yet that could not be done *in this* case and the Court and prevailing party were *prevented from executing* the judgment below, because there was *no severance* below, nor even appearance here until after nearly two years.

The *second* reason for requiring severance, given in the opinion, viz: that a *second writ* should not be allowed to be sued out by the joint party not appealing, also existed *in this* case, because, until the year to appeal expired, Williams had the *absolute right* to sue out a *second* writ of error, because no severance had been made.

So that, we respectfully ask Your Honors to notice, that *in this* case *both* of the *reasons* exist for requiring that there be a severance or notice to join in the writ and requiring a dismissal for the very reasons stated by Justice Miller.

And yet, the opinion in this case states:

> "In the present case *both* grounds for dismissal have been *obviated* by the *appearance* of which Williams, the co-defendant with the plaintiff in error in the Court below, has *filed in this* Court."

The Court will notice that even in the appearance of Williams in this Court nearly two years after the writ of error was sued out by Richards, there is no statement that he was *either asked or refused* to join in the appeal, nor notified to do so, nor was severance in the writ of error allowed by the Court below (reply brief, pp. 19, 21); and *Rule* 63 of that Court expressly provides for *severance* procedure (brief of defendant in error, pp. 7-8).

The opinion makes no reference to the *two* cases decided *by this Court* (quoted in our brief, pages 8 to 13), in one of which the party appealing sought and was denied the right to amend, and in both of which cases Your Honors *dismissed* the appeal *because there was* no severance or attempt to sever; and both of which cases, we submit, require a dismissal of the writ of error in the present case.

We again *quote* these *two* decisions of Your Honors, in the *second* of which this Court quotes at length as authority requiring dismissal in that case, the Supreme Court decision in *Masterson v. Herndon,* 10 Wall. 416 (Justice Miller), which case in the present instance the opinion quotes as authority for *denying* a dismissal.

In Copeland v. Waldron, 133 Fed. 217, this Court, *Hawley,* District Judge, rendering the opinion, *Gilbert* and *Ross,* Circuit Judges, concurring, has so clearly and fully covered the several phases of

this motion to dismiss the writ of error, that we quote the entire decision:

> "The motions herein made will be considered together. Appellants admit that the decree appealed from is joint, and that a joint decree should be appealed from by all, or severance made; that the fact that Pirie did not appear in the lower court furnishes no excuse for appellants leaving him out on the appeal; and that this court had the power to dismiss the appeal for want of his presence. But appellants claim that the contention of appellee that this court has no power to bring the omitted party in is not correct.
>
> "We are of opinion that the facts of this case bring it within the rule announced by the Supreme Court in Estis v. Trabue, 128 U. S. 225, 229; 9 Sup. Ct. 58; 32 L. Ed. 437. After holding that a writ of error, in which the plaintiff and defendants were designated merely by the name of a firm containing the expression '& Co.,' was not sufficient to give the court jurisdiction, but, inasmuch as the record disclosed the names of the persons composing the firm, allowed the writ to be amended, under section 1005 of the Revised Statutes (U. S. Comp. St. 1901, p. 714), the court said:
>
> " 'But there is another difficulty in the present case, which cannot be reached by an amendment in or by this court under section 1005. The judgment is distinctly one against the claimants, and C. F. Robinson and John W. Dillard, their sureties in their "forthcoming bond," jointly, for a definite sum of money. There is nothing distributive in the judgment, so that it can be regarded as containing a separate judgment against the claimants and another separate judgment against the sureties or as containing a judgment against the sureties, payable and enforceable only on a failure to

recover the amount from the claimants; and execution is awarded against all of the parties jointly. * * * It is well settled that all the parties against whom a judgment of this kind is entered must join in a writ of error, if any one of them takes out such writ, or else there must be a proper summons and severance, in order to allow of the prosecution of the writ by any less than the whole number of the defendants against whom the judgment is entered * * * Where there is a substantial defect in a writ of error, which this court cannot amend, it has no jurisdiction to try the case. * * * It will then, of its own motion, dismiss the case, without awaiting the action of a party.'

"This case is directly in point. It is, however, argued that since the rendition of the decision the Supreme Court has changed its ruling, and accepted the views contended for by appellants; and our attention has been called to Inland & Seaboard Coasting Co. v. Tolson, 136 U. S. 572; 10 Sup. Ct. 1063; 34 L. Ed. 539, which it is claimed is 'strikingly illustrative' of their contention. The facts in that case were dissimilar from the case at bar. There Tolson recovered damages in the Supreme Court of the District of Columbia. The Inland & Seaboard Coasting Company was the sole defendant therein, and gave an undertaking with four sureties, and took an appeal to the general term, where the court, in accordance with its rule in such cases, when it affirmed the judgment of the special term, also entered judgment against the sureties in the undertaking. The writ of error, having been sued out without mentioning the sureties, was dismissed. In moving to rescind the judgment of dismissal, the plaintiff in error argued that the judgments of the general term 'were in fact and in law two judgments, and that the sureties were not parties to the tort suit'. The court contented itself

by a simple order granting the motion to rescind the dismissal, and allowed the writ of error to be amended so as to include the sureties. We are not prepared to say that in making this order there was necessarily any departure from the rule announced in Estis v. Trabue, and it is fair to presume that none was intended. Within five months after the decision in the Tolson case the Supreme Court decided Mason v. United States, 136 U. S. 581; 10 Sup. Ct. 1062; 34 L. Ed. 345, where a postmaster and his sureties were sued jointly for a breach of the bond, and he and a part of the sureties appeared and defended, the suit was abated as to one of the sureties, the others made default, and judgment of default was entered against them. The sureties who had appeared and defended the suit sued out a writ of error. A motion was made to amend the writ by adding the omitted parties, and the motion was denied.

"Walton v. Marietta Chair Co., 157 U. S. 342, 346; 15 Sup. Ct. 626; 39 L. Ed. 725, furnishes an illustration of the character of cases where amendments to the writ of error should be allowed under the provisions of section 1005 of the Revised Statutes. They are cases where 'the statement of the title of the action or parties thereto in the writ is defective', or where the defect, whatever it be, 'can be remedied by reference to the accompanying record'. This is also made clear by reference to the language of the statute. This is not a case where the appeal is merely defective in form.

"The truth is that the rule must be determined by the particular facts in each case as they arise. In the present case the record does not, as mentioned in the statement of facts, disclose that James Pirie, who was one of the three parties against whom the suit was brought to recover damages for breach of a joint con-

tract, and against whom judgment was rendered, was in any manner joined in the appeal, or that he was ever notified to join, or severed for failure or refusal to join. These things must appear to give this court jurisdiction of the appeal. As was said by the court in Inglehart v. Stansbury, 151 U. S. 68, 72; 14 Sup. Ct. 237; 38 L. Ed. 76:

"'This could only be shown by a summons and severance, or by some equivalent proceeding, such as a request to the other defendants, and their refusal to join in the appeal, or at least a notice to them to appear, and their failure to do so; and this must be evidence upon the record of the court appealed from, in order to enable the party prevailing in that court to enforce his decree against those who do not wish to have it reviewed, and to prevent him and the appellate court from being vexed by successive appeals in the same matter.'

"The motion to dismiss is granted, and the motion to amend denied."

In Continental & C. T. & S. Bank v. Corey Bros. Const. Co., 205 Fed. 282, a decree was made awarding first liens, etc. to complainant by the District Court and two only of several defendants appealed. This Court, before *Gilbert, Ross* and *Hunt,* Circuit Judges, said:

"Sale of the property of the Irrigation Company was ordered, unless payment was made by it or by any of the other defendants. Equity of redemption of the defendants was to be forever barred, and terms of sale were prescribed in detail, the purchaser to hold the property free from all liens of all the parties to suit.

"From this decree, rendered December 27, 1912, the Continental & Commercial Trust & Savings Bank and Frank H. Jones, trustees,

appealed. Appeal was allowed March 26, 1913. It does not appear that any of the other parties defendant against whom the decree is rendered join in the appeal, or that they or any of them were notified to appear, and that they or any of them had failed to appear, or, if appearing, had refused to join in the appeal. Such a situation compels us to order a dismissal of the appeal.

"The Supreme Court, in *Masterson v. Herndon,* 77 U. S. (10 Wall.) 416, 19 L. Ed. 953, held that it was established that, where the decree is joint, all the parties against whom it is rendered must join the appeal, or it will be dismissed. The court said:

" 'We think there should be a written notice and due service, or the record should show his appearance and refusal, and that the court on that ground granted an appeal to the party who prayed for it, as to his own interest. Such a proceeding would remove the objections made to premitting one to appeal without joining the other; that is, it would enable the court below to execute its decree, so far as it could be executed, on the party who refused to join, and it would estop that party from bringing another appeal for the same matter. The latter point is one to which this court has always attached much importance, and it has strictly adhered to the rule under which this case must be dismissed, and also to the general proposition that no decree can be appealed from which is not final, in the sense of disposing of the whole matter in controversy, so far as it has been possible to adhere to it without hazarding the substantial rights of parties interested.' Hardee v. Wilson, 146 U. S. 179, 13 Sup. Ct. 39, 36 L. Ed. 933; Sipperley v. Smith, 155 U. S. 86, 15 Sup. Ct. 15, 39 L. Ed. 79; Loveless v. Ransom, 107 Fed. 626, 46 C. C. A. 515; Provident Life & Trust Co. v. Camden et al., 177

Fed. 854, 101 C. C. A. 68; Ibbs v. Archer, 185 Fed. 37, 107 C. C. A. 141; Grand Island & W. C. R. Co. et al. v. Sweeney, 103 Fed. 342, 43 C. C. A. 255.

"Holding, therefore, that we are without jurisdiction, the appeal will be dismissed."

De Los Angeles v. Maytin, 216 U. S. 598, 601; 54 L. Ed. 632, 634. The Supreme Court, citing Hardee v. Wilson, 146 U. S. 179; 36 L. Ed. 933, said:

"The defendant, Mrs. Beatrice de Los Angeles, appealed, but, as the other defendants did not join in the appeal, and there was no summons and severance, the appeal must be dismissed."

Mason v. U. S., 136 U. S. 541; 34 L. Ed. 541. The Court said this

"was a case where a postmaster and the sureties on his official bond being sued jointly for a breach of the bond, he and part of the sureties appeared and defended. The suit was abated as to two of the sureties who had died, and the *other* sureties *made default and judgment by default* was entered against them. On the trial a verdict was rendered for the plaintiff, whereupon judgment was entered against the principal and all the sureties for the amount of the verdict. The sureties *who appeared* sued out a writ of error to this judgment, *without joining* the principal or the sureties who had made default. The plaintiff in error moved to amend the writ of error by adding the omitted parties as complainants in error, or for a severance of the parties, and it was held that the motion must be denied and the writ of error be dismissed. In Feibelmann v. Packard, 108 U. S. 14; 27 L. Ed. 634, a writ of error was sued out *by one* of two or more joint defend-

ants, without a summons and severance or equivalent proceeding, and was therefore dismissed".

Hughes, Federal Procedure, 2d Ed., p. 555, says:

> "The reason why, *all* the parties must join where the judgment is *joint* is that *otherwise the Court could not execute its decree* on the parties who refused to join, and such parties might in their turn attempt to review the case also."

The case of Hill v. Western Electric Co., 214 Fed. 243, cited by Your Honors' opinion, we submit, was not like the present, in any respect; that was a bankruptcy appeal; and we quote the *statement* of that Court relating to filing a similar waiver in the Circuit Court of Appeals, being apparently the reason why *that* Court denied a dismissal of the writ of error there. That Court said (p. 245):

> "*No objection* has been made to this, and, on the contrary, counsel for the motion to dismiss have since confined their attention to the merits of the order of adjudication" (p. 245).

While in the present case we have constantly objected and consistently maintained that the writ of error should be dismissed.

We respectfully submit that the *two* cases above quoted determine this case and require a dismissal of the writ of error, these two cases were not only decided by this Court, but, with the exception of Judge Hawley in the first case, *both* cases were de-

cided by Your Honors now passing upon the same question in this case without any reference thereto and contrary to your decisions in the foregoing *two* cases.

The Supreme Court has held and this Court in the two cases just quoted, decided by Your Honors has likewise held, that severance in some way or other was necessary to give the Supreme Court and this Court *jurisdiction* of the writ of error.

We submit, that Your Honors should give us a further opportunity to be heard on this question, which in both of your former decisions was held to divest this Court of *jurisdiction* to pass upon the writ of error.

II.

THE INSTRUCTION HELD ERRONEOUS COULD NOT HAVE AFFECTED THE VERDICT, BECAUSE AT RICHARDS' REQUEST, THE COURT GAVE OTHER INSTRUCTIONS PREVENTING ANY POSSIBILITY OF THIS INSTRUCTION AFFECTING THE RESULT; AND THIS INSTRUCTION WAS THEREFORE CLEARLY HARMLESS.

The Court *reversed* the judgment in this case, because of a single *instruction* to the jury which the Court thought might have affected the result.

The *opinion* states:

> "Error is assigned to the following instruction to the jury. 'You should consider, therefore, whether or not the defendants Williams

and Richards entered into any partnership agreement *as alleged by the plaintiff,* and whether or not, if you find that they did enter into *such agreement,* it was contemplated thereby that said Williams should have authority to borrow money for the purposes of such partnership, and whether or not the moneys borrowed by him from the plaintiff were for *such* purposes.' The complaint had *alleged* that Williams and Richards were a mining copartnership, engaged in business in the Iditarod district. The answer denied the allegation. There was no evidence that a partnership agreement was ever entered into. In fact, the evidence was that no such agreement was made. If a partnership existed, it must be inferred from facts and circumstances, from the fact that the money was advanced by Richards to Williams and it was agreed that Williams was to 'go down there' and use his own judgment as to making the purchase. From these facts and from expressions used by both in the correspondence which followed, it would appear that there was a tacit understanding that they should be jointly interested in a quarter interest in Boulton's lease.

"The whole of the evidence in the case, and there is no evidence to the contrary, is that there was no thought, either by Richards or Williams, of a general copartnership. The utmost that can be claimed for the evidence is that their minds met upon a joint venture to purchase and perhaps to operate as a mining copartnership, a one-fourth interest in the lease then held by Boulton. There was no thought of the possibility of purchasing any other interest than that one-fourth, nor was there any suggestion of giving to Williams power to borrow money. The money which Richards had given him was ample for the purpose they had in view—$2,000 for the pur-

chase of the one-fourth interest, $500 for Williams' expenses. There was no testimony, and no deducible inference from the evidence which justified the submission to the jury of *the question whether it was contemplated by the agreement that Williams should have authority to borrow money for the purpose of such partnership.* The evidence, such as it was, was to the contrary, as witness the language with which Williams notified Richards that he had borrowed the $3500: 'Now, Dick, how I got the money is the hardest part for me to tell. You may be angry, but I didn't do it with any selfish motive, or try to take advantage of the kindness you did for me.' *If it appeared* from a special finding, *or otherwise,* that the jury's verdict was based on the ground that Richards subsequently ratified the act of Williams, *we might pass over* this assignment of error *as harmless,* but the verdict being general, we cannot say that the erroneous instruction so given did not affect the result."

INSTRUCTION REQUESTED BY RICHARDS AND GIVEN.

The plaintiff in error, Richards, requested the Court to give and the Court *did* give to the jury the following *instruction,* viz:

"The Court instructs the jury that a *mining* partnership can only exist where several parties co-operate in working mining property; mere ownership as tenants in common, either of the mining ground itself or a leasehold thereon, not being sufficient.

"*Where a mining copartnership is shown to exist* within the definition above given, *each partner has power to bind his copartners by dealing on credit and the giving of promissory*

> *notes* for the purpose of working the mine, where it appears to be necessary or usual in the management of the business; but *one mining copartner has no implied power or authority to borrow money and sign the firm name to a promissory note* as evidence of such loan, where the money is to be and is used in purchasing mining ground or interests therein or assignments of leases thereon, *and if he does so without the knowledge or consent of his copartners, they are not liable thereon"* (Tr. 263, 264).

The entire charge will be found in the transcript at pp. 247-256.

The Court had already stated the *issues* raised by the pleadings (Tr. 247-248), and then states the *contention* of the plaintiff and the *contention* of the defendant (Tr. 248-249).

The record shows that *opening statements* were made to the Court and jury by both sides (Tr. 21), also from counsel's own *exception* to *part* of charge (Tr. 258); to these *contentions* the Court refers, and they are *not* contained in the record; and the Court states: "On the part of the plaintiff it is *contended*" and "plaintiff further contends" (Tr. 248-249). "On the part of the defendant Richards it is *contended*" (Tr. 249).

The instruction set out in the opinion of the Court and because of which Your Honors reversed the judgment, follows right after this statement of the contentions of both sides; and it will be noticed that the trial Court *in* this instruction said:

> "You should consider therefore, whether or not the defendants *entered into any* partnership agreement *as alleged by* the plaintiff" etc. (Tr. 249).

These *contentions* of the *plaintiff* did include the *contemplated* borrowing; and these *contentions* of the *defendants* stated by the Court did also include the *dispute and denial* of such *contemplated* borrowing; and it was under and in view of those conditions that the Court gave the *questioned* instruction and followed it up by the defendant Richards' *requested* instruction above quoted (Tr. 249-250).

This *requested* instruction was then given (Tr. 250), and it expressly told the jury that

> "where a *mining* partnership is shown to exist, *each partner has the power* to bind his co-partners by dealing on credit *and the giving of promissory notes* for the purpose of working the mine, where it appears to be necessary or usual in the management of the business; *but one mining copartner has no* implied *power or authority to borrow* money and *sign the firm name to a promissory note* as evidence of such loan, *where* the money is *to be used in purchasing* mining ground or interests therein or assignments of leases thereon, *and if he does so without the knowledge or consent* of his copartners, *they are not liable thereon*" (Tr. 263, 264).

We respectfully submit that *this requested* instruction is *substantially the same* as the *other* instruction which the Court holds erroneous.

This instruction, requested by Richards and given by the Court, certainly removed any pos-

sible error that might exist in the other single instruction because of the giving of which this Court reversed the judgment.

III.

We also submit the Court is mistaken in its opinion, wherein it is stated that there was absolutely *no evidence* of it being *contemplated* in their agreement that any other interest should be purchased.

The witness Williams, whose testimony the opinion quotes, also testified, according to the question asked Richards by his own counsel:

> "Q. *You heard* Williams' testimony at this second trial, that in the N. C. Company's store there, apparently in the presence of Mr. Curtis, *you told him* that when he got down there *if he needed any more money you would go stronger* than you had already. What do you say about that?
>
> A. No, sir. I never said no such thing" (Tr. 200).

Williams *did* testify as follows:

> "I was supposed to make a purchase. I was to use my own judgment, in reference to any transaction. If I purchased anything I was to work it I suppose" (Tr. 25). "I remember Mr. Richards saying in the store: 'If there is no confliction with that ground, *we* will go stronger than that' " (Tr. 26). "We talked the

matter over, the Boulton lay" (Tr. 27). "Q. Did you *borrow* the money from Mr. Richards? A. No, sir" (Tr. 29).

Richards also told Joseph H. *Egler* (witness for the plaintiff) whom he wanted to take that proposition off his hands, he was interested and to the extent of $6,000 as follows:

> "Q. Did you, in that conversation with Mr. Richards, discuss with him anything about purchasing any interest that he had—any mining interests?
>
> A. Well, the conversation that I had with Mr. Richards was, he wanted to know if I didn't want to take that proposition off his hands.
>
> A. We were talking about mining matters. He was mining at that time on Cache Creek, and I was mining on Tofty. And he wanted to know if I didn't want to take up that proposition in the Iditarod. I told him at the time I didn't know. I said, 'What will it cost?' He says, *'I am in about six thousand dollars.'* I told him I couldn't handle it, because I had spread out too much myself. And that was about all the conversation in reference to that that I can recollect of at the present time" (Tr. 148-149).

We respectfully submit that a rehearing should be granted; and that a re-examination and consideration of the record and the whole case would certainly disclose that the *single instruction* because of which the Court reversed the judgment, did not and could not possibly affect the verdict

or result, or injure the plaintiff in error before or with the jury in any respect.

Dated, San Francisco,
August 1, 1916.

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CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for defendant in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

CHARLES J. HEGGERTY,
Of Counsel for Defendant in Error and Petitioner.